Idris Hydraulic (M) Bhd v The Chief Minister of the State of Sabah

HIGH COURT (KOTA KINABALU) — APPLICATION FOR JUDICIAL REVIEW NO BKI-25–9/3 OF 2022
LEONARD SHIM J
2 AUGUST 2023

Administrative Law — Judicial review — Application for — Application for judicial review to quash decision of Chief Minister of State of Sabah to cancel applicant's sustainable forest management licence agreement ('SFMLA') — Whether cancellation done in accordance with objectives and procedures set out in s 24A of Forest Enactment 1968 — Whether cancellation done in public's interest — Whether there was procedural impropriety as matter fell under s 24D of Forest Enactment 1968 — Whether decision invalid on grounds of illegality, irrationality, procedural impropriety or proportionality — Whether decision ultra vires s 24A of Forest Enactment 1968 — Whether cancellation of timber licence agreement disproportionate with alleged breach — Whether there was breach of natural justice — Forest Enactment 1968 s 24A & 24D

This was a substantive application for judicial review against the decision made by the first respondent to cancel the sustainable forest management licence agreement ('SFMLA') made between the first respondent and the applicant for a period of 100-years. Under the SFMLA, the applicant had been granted permission to 'plant, rehabilitate and harvest forests under principles of sustainable forest management and environmental conservation for economic, environmental and social purposes' in 234,552 hectares of commercial forest reserve, in consideration of the payment of all due and royalties by the applicant to the second respondent. Pursuant to the SFMLA, a timber license was granted to the applicant. Even though the SFMLA was for a period of 100-years, the applicant had not harvested forests since 2007 till to date. This was due to the applicant's failure in obtaining the required approvals for its Forest Management Plan and Annual Work Plan from the Sabah Forestry Department as required under the SFMLA and/or the Enactment. Nevertheless, without the knowledge of the first respondent, the applicant entered into a debenture with Universal Trustee (M) Bhd ('UTM') ('debenture'). The applicant charged all its assets and properties by way of fixed and floating charge to secure the payment and discharge of all principal outstanding for the debt obligations to Lambang Pertama Sdn Bhd ('LPSB'). This included the SFMLA and any proceeds arising therefrom. LPSB was wholly owned by Idaman Unggul Bhd ('IUB') and both companies had been wound up. Subsequently, the first respondent had instructed the Chief Conservator of Forests ('CCF') to issue a letter to the applicant to inform the

applicant that it was afforded the opportunity to be heard as to whether the Chief Minister should exercise his powers under s 24A(1) and (2) of the Enactment to revoke or cancel the SFMLA in the public interest of the State of Sabah ('invitation letter'). The applicant, in response to the invitation letter had sent a representation ('representations'). Having considered the representations, the first respondent decided and deemed that it was not in public interest that the applicant: (a) as the sole licensee of the SFMLA was solely and ultimately owned by two insolvent and wound up companies, namely IPSB and IUB; (b) failed to obtain an approved forest management plan and annual works plan since 2010; and (c) had circumvented cl 120 of the SFMLA by effectively charging as collateral the said SFMLA and its proceeds, in order to securitise LPSB's borrowings. The first respondent, pursuant to his power under s 24A of the Enactment, deemed it fit and necessary in public interest to cancel the SFMLA with immediate effect ('impugned decision'). Hence, the present application on the grounds, inter alia, that the impugned decision: (i) was ultra vires and in breach of natural justice; (ii) made under s 24A of the Forest Enactment 1968 suffered from procedural impropriety as the matter alleged therein fell under s 24D of the Forest Enactment 1968; (iii) was irrational and unreasonable based on wrong appreciation of facts and failure to consider relevant facts; and (iv) was excessive as it violated the principle of proportionality as the cancellation of the said timber licence agreement was disproportionate and did not commensurate with the alleged breach.

Held, dismissing the application:

(1) A distinction must be drawn between the first respondent exercising his power to revoke or cancel a license agreement and the first respondent instructing the Chief Conservator of Forests to issue a letter to the license holder, inviting the latter to be heard by the Chief Minister via written representations. The Chief Conservator of Forests was neither exercising the powers of the first respondent nor had the first respondent delegated to the Chief Conservator of Forests, the power or duty to hear the applicant license holder. If there was a delegation of powers, then it would have been the Chief Conservator of Forests that would have heard and considered the representation of the applicant. But it was not. It was evident from the cancellation letter that the representations were indeed considered by the first respondent and not the Chief Conservator of Forests. In this regard, the applicant's reliance on the Delegation of Powers Enactment 1963 was irrelevant. Moreover, the first respondent clearly acted within the limits of his powers under s 24A(1) and (2) by affording the applicant licence holder an opportunity to be heard via the said representations (see paras 58–59).

(2) The Chief Conservator of Forests did not exercise the first respondent's power to cancel the SFMLA. It was the first respondent that had exercised

his powers under s 24A(1). The powers under s 24A of the Enactment to hear and to decide was in fact exercised by the first respondent. Therefore, there was no procedural impropriety by the first respondent and there was also no issue of the first respondent acting ultra vires of s 24A of the Enactment (see paras 60–61).

(3) The primacy of s 24A was demonstrated by the non-obstante clause and the breadth and scope of the provision. Section 24A empowered the first respondent to not just revoke or cancel a license, it also empowered the first respondent to vary the conditions or impose such additional conditions. The only limitation to s 24A was that the first respondent must: (a) deem it to be in the public interest; and (b) afford the licensee an opportunity to be heard before exercising his powers. Section 24D concerned the termination (not cancellation) of the license, and was narrower in its scope to that of s 24A of the Enactment. Given the wording of s 24A, it was clear that the Sabah Legislature did not intend for s 24A to be limited by s 24D of the Enactment. In any event, the cancellation was wholly pursuant to s 24A and the applicant was afforded an opportunity to be heard by the first respondent's via the invitation letter. There was no procedural impropriety by the first respondent in undertaking a procedure under s 24A of the Enactment (see paras 65–67).

(4) The applicant was a wholly owned subsidiary and an asset of LPSB and was therefore part of the liquidation process. The liquidation of LPSB would inevitably involve the sale of the applicant in order to settle the debts of LPSB's creditors. It could not be denied that, as a result of the liquidation of LPSB and IUB, the right over Sabah's forest natural resources would be up for sale to the highest bidder. Even though the sale of the applicant as a subsidiary of LPSB to the highest bidder may not be prohibited under the SFMLA, the first respondent was nevertheless empowered under s 24A of the Enactment to consider whether such sale was in the public interest since it was a matter that went above and beyond the scope of the SFMLA. In such circumstances, it was reasonable for the Minister to do so and to conclude that it isn't in the public interest for the applicant and by extension the SFMLA, to be sold off to the highest bidder. The State, in such circumstances, would have been put in a position where it would have to deal with a stranger or worse, a person or entity that was unqualified, unsuitable or one that would not have otherwise been granted an SFMLA in the first place (see paras 71, & 73–74).

(5) The applicant's explanation in the representation that it had no such indebtedness and unenforceable against it was not acceptable to the first respondent. The reason why the applicant had no such indebtedness was because it was nothing but an asset of the now wound up holding

company, LPSB. If LPSB was indebted, the applicant and its assets and properties were liable to be liquidated as part of LPSB's assets. There was also no basis to say that the debenture was unenforceable against the applicant. The objective of the SFMLA, inter alia, was for revenues and proceeds from the extraction and felling of trees to be reinvested into reforestation and tree planting within the SFMLA area. Revenues were not there to finance or cover the business debts of the applicant's holding (LPSB) and ultimate holding companies (IUB) (see para 80).

(6) Under the head of irrationality, the applicant must show that the decision was so outrageous in its (a) defiance of logic or of accepted moral standards that (b) no sensible person who had applied his mind to the question to be decided could have arrived at it. From the affidavit evidence, it was evident that the applicant had failed to show this. To the contrary, the respondents had shown that the decision of the Chief Minister to cancel the applicant's license was rational under the circumstances (see para 85).

(7) The court could not entertain any contention by the applicant that it was able to remedy any breaches to the SFMLA or that it could 'turn the corner' because the applicant had not shown any plans to revive operations to implement the SFMLA in the written Representations. Further, it was also the applicant's plan was to prevent the SFMLA from being cancelled so that it could sell the same to the highest bidder. Under these circumstances, there was no question about varying the conditions or imposing additional conditions under the SFMLA given that there was simply no prospect of revival. The Sabah people should not be embroiled in the liquidation process and be deprived of the revenue which they would otherwise gain from the responsible exploitation of Sabah's natural resources (see paras 88 & 91).

(8) The first respondent had explained his reasons behind the decision and why he deemed it necessary in the public interest to cancel the said SFMLA. In contrast, the applicant had failed to provide any good reasons as to why it would not be in the public interest to cancel the SFMLA. There was a presumption that executive acts were done in good faith and for the public benefit. Even if there was an error of law, it was settled law that the remedies of certiorari or declaration would not be granted to set right mere errors of law unless substantial injustice had ensued. On the facts of the case, the cancellation of the SFMLA was proportionate and there was no substantial injustice had occurred from the said cancellation (paras 92–94).

(9) In the proceeding, there was clear absence of any 'overwhelming evidence' to support the applicant's claim that the first respondent's decision to cancel the said SFMLA was unreasonable or irrational. Merely calling the first respondent's decision 'perverse' or 'perverted' was

insufficient. The applicant had failed to put before the court, 'overwhelming evidence' that no reasonable Minister could or would have, cancelled the applicant's SFMLA given the same circumstances and facts. Mere disagreement with the Minister was insufficient (see paras 103–105)

(10) The applicant had failed to prove that the impugned cancellation of the said SFMLA in the public interest was invalid on grounds of illegality, irrationality, procedural impropriety or proportionality. Neither did the respondents take into consideration irrelevant matters or had failed to consider relevant matters in the issuance of the said notices. In the premises, the said letter of cancellation which was issued in accordance with the law was valid (see para 111).

[Bahasa Malaysia summary

Ini adalah permohonan substantif untuk semakan kehakiman terhadap keputusan yang dibuat oleh responden pertama untuk membatalkan perjanjian lesen pengurusan hutan lestari ('SFMLA') yang dibuat antara responden pertama dan pemohon untuk tempoh 100 tahun. Di bawah SFMLA, pemohon telah diberikan kebenaran untuk 'menanam, memulihkan dan membalak hutan di bawah prinsip pengurusan hutan lestari dan pemuliharaan alam sekitar untuk tujuan ekonomi, alam sekitar dan sosial' dalam 234,552 hektar hutan simpan komersial, sebagai pertimbangan pembayaran semua kena dibayar dan royalti oleh pemohon kepada responden kedua. Menurut SFMLA, lesen kayu telah diberikan kepada pemohon. Walaupun SFMLA adalah untuk tempoh 100 tahun, pemohon tidak pernah membalak hutan sejak 2007 sehingga kini. Ini disebabkan oleh kegagalan pemohon mendapatkan kelulusan yang diperlukan untuk Pelan Pengurusan Hutan dan Rancangan Kerja Tahunan daripada Jabatan Perhutanan Sabah seperti yang dikehendaki di bawah SFMLA dan/atau Enakmen. Namun begitu, tanpa pengetahuan responden pertama, pemohon telah memeterai debentur dengan Universal Trustee (M) Bhd ('UTM') ('debentur'). Pemohon mengenakan semua aset dan hartanya melalui gadaian tetap dan terapung untuk menjamin pembayaran dan pelepasan semua pokok tertunggak untuk obligasi hutang kepada Lambang Pertama Sdn Bhd ('LPSB'). Ini termasuk SFMLA dan sebarang hasil yang timbul daripadanya. LPSB dimiliki sepenuhnya oleh Idaman Unggul Bhd ('IUB') dan kedua-dua syarikat telah digulung. Selepas itu, responden pertama telah mengarahkan Ketua Pemulihara Hutan ('CCF') untuk mengeluarkan surat kepada pemohon untuk memaklumkan pemohon bahawa ia diberi peluang untuk didengar tentang sama ada Ketua Menteri harus menggunakan kuasanya di bawah s 24A (1) dan (2) Enakmen untuk membatalkan atau memansuhkan SFMLA demi kepentingan awam Negeri Sabah ('surat jemputan'). Pemohon, sebagai jawapan kepada surat jemputan telah menghantar representasi ('representasi'). Setelah mempertimbangkan representasi, responden pertama memutuskan

dan menganggap bahawa adalah bukan untuk kepentingan awam bahawa pemohon: (a) sebagai pemegang lesen tunggal SFMLA adalah sepenuhnya dan akhirnya dimiliki oleh dua syarikat muflis dan digulung, iaitu IPSB dan IUB; (b) gagal mendapatkan pelan pengurusan hutan dan rancangan kerja tahunan yang diluluskan sejak 2010; dan (c) telah memintas klausa 120 SFMLA dengan secara berkesan mengenakan cagaran SFMLA tersebut dan hasilnya, untuk menjamin pinjaman LPSB. Responden pertama, menurut kuasanya di bawah s 24A Enakmen, difikirkan sesuai dan perlu demi kepentingan awam untuk membatalkan SFMLA berkuat kuasa serta-merta ('keputusan yang dipertikaikan'). Oleh itu, permohonan semasa atas alasan, antara lain, bahawa keputusan yang dipertikaikan: (i) adalah ultra vires dan melanggar keadilan semula jadi; (ii) yang dibuat di bawah s 24A Enakmen Hutan 1968 mengalami ketidakwajaran prosedur kerana perkara yang didakwa di dalamnya adalah di bawah s 24D Enakmen Hutan 1968; (iii) adalah tidak rasional dan tidak munasabah berdasarkan penghayatan fakta yang salah dan kegagalan untuk mempertimbangkan fakta yang berkaitan; dan (iv) adalah keterlaluan kerana ia melanggar prinsip perkadaran kerana pembatalan perjanjian lesen kayu tersebut adalah tidak seimbang dan tidak setimpal dengan pelanggaran yang didakwa.

Diputuskan, menolak permohonan:

(1) Perbezaan mesti dibuat antara responden pertama yang menjalankan kuasanya untuk membatalkan atau memansuhkan perjanjian lesen dan responden pertama mengarahkan Ketua Pemulihara Hutan untuk mengeluarkan surat kepada pemegang lesen, menjemputnya untuk didengari oleh Ketua Menteri melalui representasi bertulis. Ketua Konservator Hutan tidak menggunakan kuasa responden pertama mahupun responden pertama menyerahkan kuasa atau kewajipan kepada Ketua Konservator Hutan untuk mendengar pemegang lesen pemohon. Sekiranya terdapat perwakilan kuasa, maka Ketua Konservator Hutan yang akan mendengar dan mempertimbangkan representasi pemohon. Tetapi tidak. Terbukti daripada surat pembatalan itu bahawa representasi itu sememangnya dipertimbangkan oleh responden pertama dan bukannya Ketua Konservator Hutan. Dalam hal ini, pergantungan pemohon kepada Enakmen Perwakilan Kuasa 1963 adalah tidak relevan. Selain itu, responden pertama dengan jelas bertindak dalam had kuasanya di bawah s 24A(1) dan (2) dengan memberi peluang kepada pemegang lesen pemohon untuk didengar melalui representasi tersebut (lihat perenggan 58–59).

(2) Ketua Konservator Hutan tidak menggunakan kuasa responden pertama untuk membatalkan SFMLA. Ia merupakan responden pertama yang telah menggunakan kuasanya di bawah s 24A(1). Kuasa di bawah s 24A Enakmen untuk mendengar dan memutuskan sebenarnya telah dilaksanakan oleh responden pertama. Oleh itu, tiada ketidakwajaran

prosedur oleh responden pertama dan juga tidak timbul isu responden pertama bertindak ultra vires s 24A Enakmen (lihat perenggan 60–61).

(3) Keutamaan s 24A telah ditunjukkan oleh klausa non-obstante dan keluasan serta skop peruntukan itu. Seksyen 24A memberi kuasa kepada responden pertama untuk tidak hanya membatalkan atau memansuhkan lesen, ia juga memberi kuasa kepada responden pertama untuk mengubah syarat atau mengenakan syarat tambahan tersebut. Satu-satunya had kepada s 24A ialah responden pertama mesti: (a) menganggapnya untuk kepentingan awam; dan (b) memberi peluang kepada pemegang lesen untuk didengari sebelum menggunakan kuasanya. Seksyen 24D berkenaan penamatan (bukan pembatalan) lesen, dan skopnya lebih sempit kepada s 24A Enakmen. Memandangkan perkataan s 24A, adalah jelas bahawa badan perundangan Sabah tidak bercadang untuk s 24A dihadkan oleh s 24D Enakmen. Walau apa pun, pembatalan adalah sepenuhnya menurut s 24A dan pemohon diberi peluang untuk didengari oleh responden pertama melalui surat jemputan. Tiada ketidakwajaran prosedur oleh responden pertama dalam menjalankan prosedur di bawah s 24A Enakmen (lihat perenggan 65–67).

(4) Pemohon adalah anak syarikat milik penuh dan aset LPSB dan oleh itu merupakan sebahagian daripada proses likuidasi. Likuidasi LPSB sudah pasti akan melibatkan penjualan pemohon untuk menyelesaikan hutang pemiutang LPSB. Tidak dapat dinafikan bahawa, hasil likuidasi LPSB dan IUB, hak ke atas sumber asli hutan Sabah akan dijual kepada pembida tertinggi. Walaupun penjualan pemohon sebagai anak syarikat LPSB kepada pembida tertinggi mungkin tidak dilarang di bawah SFMLA, responden pertama bagaimanapun diberi kuasa di bawah s 24A Enakmen untuk mempertimbangkan sama ada penjualan tersebut adalah untuk kepentingan awam kerana ia adalah perkara yang melampaui skop SFMLA. Dalam keadaan sedemikian, adalah munasabah untuk Menteri berbuat demikian dan membuat kesimpulan bahawa ia bukan demi kepentingan awam bagi pemohon dan lanjutan SFMLA, untuk dijual kepada pembida tertinggi. Negeri, dalam keadaan sedemikian, akan diletakkan dalam kedudukan di mana ia perlu berurusan dengan orang asing atau lebih teruk, seseorang atau entiti yang tidak layak, tidak sesuai atau yang tidak akan diberikan SFMLA pada mulanya. (lihat perenggan 71 & 73–74).

(5) Penjelasan pemohon dalam representasi bahawa ia tidak mempunyai keterhutangan sedemikian dan tidak boleh dikuatkuasakan terhadapnya tidak boleh diterima oleh responden pertama. Sebab mengapa pemohon tidak mempunyai keterhutangan sedemikian adalah kerana ia hanyalah aset syarikat induk yang kini telah digulung, LPSB. Sekiranya LPSB berhutang, pemohon dan aset dan hartanya bertanggungjawab untuk

dilikuidasu sebagai sebahagian daripada aset LPSB. Juga tiada asas untuk mengatakan bahawa debentur itu tidak boleh dikuatkuasakan terhadap pemohon. Objektif SFMLA, antara lain, adalah untuk hasil dan keuntungan daripada pengekstrakan dan penebangan pokok dilaburkan semula ke dalam penghutanan semula dan penanaman pokok dalam kawasan SFMLA. Hasil tidak ada untuk membiayai atau menampung hutang perniagaan pemegangan pemohon (LPSB) dan syarikat induk muktamad (IUB) (lihat perenggan 80).

(6) Di bawah ketua ketidakrasionalan, pemohon mesti menunjukkan bahawa keputusan itu sangat keterlaluan dalam (a) menentang logik atau standard moral yang diterima bahawa (b) tidak ada orang yang waras yang telah menggunakan fikirannya kepada soalan yang akan diputuskan boleh tiba padanya. Daripada keterangan afidavit, ternyata pemohon gagal menunjukkan perkara ini. Sebaliknya, responden telah menunjukkan bahawa keputusan Ketua Menteri untuk membatalkan lesen pemohon adalah rasional di bawah keadaan (lihat perenggan 85).

(7) Mahkamah tidak boleh melayan sebarang pertikaian oleh pemohon bahawa ia dapat membetulkan sebarang pelanggaran terhadap SFMLA atau bahawa ia boleh 'memberi pelepasan' kerana pemohon tidak menunjukkan sebarang rancangan untuk menghidupkan semula operasi untuk melaksanakan SFMLA dalam Representasi bertulis. Selain itu, rancangan pemohon juga adalah untuk menghalang SFMLA daripada dibatalkan supaya ia boleh menjualnya kepada pembida tertinggi. Di bawah keadaan ini, tidak ada persoalan tentang mengubah syarat atau mengenakan syarat tambahan di bawah SFMLA memandangkan tiada prospek dihidupkan semula. Rakyat Sabah tidak seharusnya terlibat dalam proses likuidasi dan kehilangan hasil yang akan mereka perolehi daripada eksploitasi yang bertanggungjawab ke atas sumber asli Sabah (lihat perenggan 88 & 91).

(8) Responden pertama telah menjelaskan alasannya di sebalik keputusan itu dan mengapa beliau menganggap perlu demi kepentingan awam untuk membatalkan SFMLA tersebut. Sebaliknya, pemohon telah gagal untuk memberikan sebarang alasan kukuh mengapa tidak ada kepentingan awam untuk membatalkan SFMLA. Terdapat anggapan bahawa tindakan eksekutif dilakukan dengan suci hati dan untuk faedah awam. Walaupun terdapat kesilapan undang-undang, undang-undang telah diselesaikan bahawa remedi certiorari atau pengisytiharan tidak akan diberikan untuk membetulkan kesilapan undang-undang semata-mata melainkan ketidakadilan yang ketara telah berlaku. Mengenai fakta kes, pembatalan SFMLA adalah berkadar dan tiada ketidakadilan yang ketara telah berlaku daripada pembatalan tersebut (perenggan 92–94).

(9) Dalam prosiding itu, terdapat jelas ketiadaan apa-apa 'keterangan menyeluruh' untuk menyokong dakwaan pemohon bahawa keputusan

responden pertama untuk membatalkan SFMLA tersebut adalah tidak munasabah atau tidak rasional. Sekadar memanggil keputusan responden pertama sebagai 'menyeleweng' adalah tidak mencukupi. Pemohon telah gagal untuk mengemukakan di hadapan mahkamah'keterangan menyeluruh' bahawa tiada Menteri yang munasabah boleh atau akan, membatalkan SFMLA pemohon memandangkan keadaan dan fakta yang sama. Perselisihan pendapat dengan Menteri tidak mencukupi (lihat perenggan 103–105).

(10) Pemohon telah gagal membuktikan bahawa pembatalan SFMLA yang dipertikaikan demi kepentingan awam adalah tidak sah atas alasan menyalahi undang-undang, tidak rasional, tidak wajar prosedur atau berkadaran. Pihak responden juga tidak mengambil kira perkara yang tidak berkaitan atau gagal mempertimbangkan perkara yang berkaitan dalam pengeluaran notis tersebut. Di dalam premis tersebut, surat pembatalan tersebut yang dikeluarkan mengikut undang-undang adalah sah (lihat perenggan 111).]

Cases referred to

Andrew Heng v Suruhanjaya Sekuriti Malaysia [2021] MLJU 864, HC (refd)
Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals [2020] 1 MLJ 281; [2020] 1 CLJ 162, FC (distd)
Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223, CA (refd)
B Surinder Singh Kanda v The Government of the Federation of Malaya [1962] 1 MLJ 169, PC (refd)
Burmah Oil Co Ltd v Bank of England [1980] AC 1090, HL (refd)
Dr A Dutt v Assunta Hospital [1981] 1 MLJ 304, FC (refd)
Government of Malaysia & Anor v Jagdis Singh [1987] 2 MLJ 185; [1987] 1 CLJ 451, SC (refd)
Ho Tack Sien & Ors v Rotta Research Laboratorium SpA & Anor (Registrar of Trade Marks, intervener) [2015] 4 MLJ 166, FC (refd)
Jia Le Geng v Minister for Immigration and Multicultural Affairs (1999) 93 FCR 556, FC (refd)
M Sentivelu a/l R Marimuthu v Public Services Commission Malaysia & Anor [2005] 5 MLJ 393, CA (distd)
Malaysia Airline System Bhd v Wan Sa' adi @ Syed Sa' adi bin Wan Mustafa [2015] 1 MLJ 757; [2015] 1 CLJ 295, FC (refd)
Malaysian Oxygen Bhd v Soh Tong Wah and another appeal [2015] 3 MLJ 730; [2015] 1 CLJ 191, CA (refd)
Minister for Immigration and Multicultural Affairs v Gunner (1998) 84 FCR 400, FC (refd)
Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals [2002] 4 MLJ 449, FC (refd)

A *Muhamad Nizam bin Man v Tribunal Tuntutan Pengguna Malaysia & Anor* [2023] MLJU 158, HC (refd)
Ngiam Geok Mooi v Pacific World Destination East Sdn Bhd [2016] 2 MLJ 741; [2016] 1 CLJ 395, CA (refd)
Perbadanan Kemajuan Kraftangan Malaysia v DW Margaret a/p David Wilson
B *(t/a Kreatif Kraf)* [2010] 2 MLJ 713, FC (refd)
Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi bin Mukhtar [2020] 1 MLJ 141; [2020] 1 CLJ 1, FC (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (folld)
C
Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)
State Public Service Commission, Sarawak v Sarjit Singh Khaira [1998] MLJU 591; [1999] 2 CLJ 809, CA (refd)
D *Superintendent of Land and Survey Department Kuching-Divisional Office & Anor v Ratnawati bt Hasbi Mohamad Suleiman* [2020] 2 MLJ 553; [2020] 2 CLJ 425, FC (refd)
The Edge Communication Sdn Bhd v Ketua Setiausaha Kementerian Dalam Negeri & Anor [2016] MLJU 1842; [2016] 1 LNS 1845, HC (refd)
E *Yusof bin Sudin v Suruhanjaya Perkhidmatan Polis & Anor* [2008] 4 MLJ 687, CA (refd)

Legislation referred to

Delegation of Powers Enactment 1963
F Forest Enactment 1968 ss 24A, 24A(1), (2), 24D, 24D(7)
Printing Presses and Publications Act 1984
Rules of Court 2012 O 41, O 41 r 5, O 53 r 3(2)

Peter Lee (Lee & Assoc) for the applicant.
G *Tengku Ahmad Fuad BTA Burhanuddin (with Syed Anuar) (FT Ahmad & Co) for the respondents.*

Leonard Shim J:

H INTRODUCTION

[1] This is the substantive application for judicial review against the decision made by the first respondent vide the letter of cancellation dated 28 February 2022 which cancelled the Sustainable Forest Management Licence
I Agreement dated 10 January 1997.

[2] The applicant's application for judicial review includes the following reliefs:

(a) an order of certiorari for the purpose of quashing the decision made by the first respondent for himself and/or for and on behalf of the second defendant vide his letter of cancellation dated 28 February 2022 to cancel the Sustainable Forest Management Licence Agreement dated 10 January 1997 made between the Chief Minister of the State of Sabah on behalf of the Government of the State of Sabah and the applicant, and the Licence No SFMLA: 01/97 ('the said timber licence agreement');

(b) an order of mandamus for the purpose of compelling the first respondent to instruct, direct and/or authorise the Sabah Forestry Department and/or its servants and/or agents to carry out all necessary action and process to approve and issue the relevant forestry management plan and annual work plan to the applicant reasonably in accordance with the terms of the said timber licence agreement so as to enable the applicant to perform and enforce its rights under the said timber licence agreement; and

(c) a declaration that the decision by the first respondent to cancel the said timber licence agreement vide the said letter of cancellation dated 28 February 2022 ('the impugned decision') issued to the applicant is ultra vires s 24A of the Forest Enactment 1968, null and void and of no legal effect.

[3] The grounds of this application are stated in the statutory statement under O 53 r 3(2) of the Rules of Court 2012 (encl 2) and in the applicant's affidavit in support dated 29 March 2022 (encl 3) filed in court as follows:

(a) the impugned decision is ultra vires and in breach of natural justice;

(b) the impugned decision made under s 24A of the Forest Enactment 1968 suffers from procedural impropriety as the matter alleged therein falls under s 24D of the Forest Enactment 1968;

(c) the impugned decision is irrational and unreasonable based on wrong appreciation of facts and failure to consider relevant facts; and

(d) the impugned decision is excessive as it violated the principle of proportionality as the cancellation of the said timber licence agreement is disproportionate and did not commensurate with the alleged breach of contract therein.

FACTUAL BACKGROUND

[4] On 10 September 1997, the applicant and the first respondent entered into a Sustainable Forest Management Licence Agreement ('SFMLA') for a period of 100-years. Under the SFMLA, the applicant has been granted permission to 'plant, rehabilitate and harvest forests under principles of

A sustainable forest management and environmental conservation for economic, environmental and social purposes' in 234,552 hectares of commercial forest reserve identified as Forest Management Units 8 and 13 ('FMUs 8 and 13'), in consideration of the payment of all due and royalties by the applicant to the second respondent. Pursuant to the SFMLA, a timber license was granted to the applicant (SFMLA No 01/97). See: encl 3, PDF p 20.

[5] At all times, the applicant and the SFMLA is subject to and must be construed in accordance with the Enactment. See: cl 123 of the SFMLA, encl 3, PDF p 56.

[6] Even though the SFMLA was for a period of 100-years, the applicant has not harvested forests since 2007 till to date (see: encl 7, PDF p 859). This was due to the applicant's failure in obtaining the required approvals for its Forest Management Plan and Annual Work Plan from the Sabah Forestry Department as required under the SFMLA and/or the Enactment.

[7] On 23 October 2003, the applicant entered into a debenture with Universal Trustee (M) Bhd ('UTMB') ('the debenture'). Under the debenture, the applicant agreed to charge all its assets and properties by way of fixed and floating charge to secure the payment and discharge of all principal outstanding for the debt obligations to Lambang Pertama Sdn Bhd. This includes the SFMLA and any proceeds arising therefrom. The debenture was created without the knowledge and consent of the first respondent. It was not until 2021 which the first respondent became aware of the debenture. See: encl 3, PDF p 396.

[8] At present, the applicant has only one shareholder — Lambang Pertama Sdn Bhd ('LPSB'). While LPSB is in turn wholly owned by Idaman Unggul Bhd ('IUB'). For all intents and purposes, the applicant is merely an asset of LPSB that will be liquidated in order to satisfy the debt owing to the creditors of LPSB.

[9] Since 30 March 2018, IUB has been wound up and a liquidator has been appointed.

[10] Since 14 December 2020, LPSB has been wound up and the same liquidator as IUB has been appointed for LPSB. See: encl 7, PDF p 34.

[11] Since 14 December 2020 till to date, the directors of the applicant have been embroiled in a dispute with the LPSB seemingly without any resolution in sight. This is well documented in exh DFK3, encl 7, PDF pp 7 to 884.

[12] On 9 November 2021, the first respondent instructed the Chief Conservator of Forests to issue a letter dated 9 November 2021 to the applicant to inform the applicant that it is now 'afforded the opportunity to be heard as to whether the Chief Minister should exercise his powers under s 24A(1) and (2) of the Forest Enactment 1968 to revoke or cancel the SFMLA in the public interests of the State of Sabah ('the invitation letter'). The full content is as follows (see: encl 7, PDF pp 943–946):

Sila catat rujukan kami apabila menjawab surat ini. *(Please quote this reference in any reply to this letter).*

Ruj. Tuan: *(Your Ref.)*

Ruj. Kami: *(Our Ref.)* JPHTN/KKH(S) 700-2/1/7/JILID 4/23

by Hand/Fax/E-mail/Courier Service

9 November 2021

Head of Operations
IDRIS HYDRAULIC (MALAYSIA) BERHAD
Unit A-9-09, Capital 1, Oasis Square
2, Jalan PJU 1A/7A
Oasis Damansara
47301 Petaling Jaya
Selangor Darul Ehsan

T: 03-78321188 / 1189
F: 03-27193130

IMPORTANT

Dear Sirs,

RE: IDRIS HYDRAULIC (MALAYSIA) BERHAD ('IHMB')

In the Matter of:

Sustainable Forest Management Licence Agreement (SFMLA 01/97)

Invitation to be heard and make representations pursuant to S24A(1)&(2) Forest Enactment 1968 (referred to as the 'SFMLA')

I refer to the above and am instructed by The Right Honourable Chief Minister, being the Minister presently in charge of Natural Resources, to inform you that you are now afforded the opportunity to be heard as to whether the Chief Minister should exercise his powers under Section 24A(1) & (2) of the Forest Enactment 1968 to revoke or cancel the SFMLA in the public interests of the State of Sabah.

Accordingly, The Chief Minister requires that you be heard by way of representations in writing, the contents of which shall be in respect of the following matters: -

1. That Lambang Pertama Sdn Bhd, the sole shareholder of IHMB, is wound-up, insolvent and/or in liquidation;

A

2. That Idaman Unggul Berhad, the ultimate holding company of both Lambang Pertama Sdn Bhd and IHMB, is itself wound-up, insolvent and/or in liquidation;

B

3. That IHMB in in debt to the extent of RM233,989,000.00;

4. That IHMB has executed a debenture over its assets in favour of Universal Trustees (Malaysia) Berhad as security for the debts of Lambang Pertama Sdn Bhd (the 'said Debenture');

C

5. That the said Debenture includes the SFMLA and all rights and privileges thereunder;

6. That the said Debenture has the effect of assigning, charging, disposing or otherwise parting with some or all of the rights and privileges under the SFMLA in favour of Universal Trustees (Malaysia) Berhad and/or a third party;

D

7. Whether IHMB has since 1997, implemented the purpose and objects of the SFMLA namely, among others, the planting, rehabilitation and harvesting of forests in accordance with the principles of sustainable forest management and environmental conservation for economic, environmental and social purposes;

E

8. That since 2010, IHMB has failed to obtain an approved Forest Management Plan and Annual Works Plan as required by the SFMLA and the Forest Enactment, 1968; and

F

9. The purposes for which IHMB was originally granted the SFMLA have failed in their entirety with no real prospects for recovery.

(Collectively referred to as the 'Public Interest matters').

G

The foregoing raise concerns as to whether in view of any or any one of the Public Interest matters stated above, the SFMLA if continued, would be in the public interests of the people of Sabah. Therefore, you are now invited and afforded the opportunity to be heard by making representations in relation to the above Public Interest matters before the Chief Minister decides or determines whether it is appropriate to exercise his powers pursuant to **Section 24A(1)** of the **Forest Enactment 1968**. Your representations shall be served no later than **30 days** from the date of the service of this letter. The address for service is stipulated below.

H

I

Address for service: -

The Chief Minister of the State of Sabah
c/o State Attorney-General of Sabah
State Attorney-General of Sabah Office
Level 22 & 23, Block A, Menara Kinabalu
Jalan Sulaman, Teluk Likas
88400 Kota Kinabalu
Sabah
Tel: 088-369600
Fax: 088-268878
E-mail: sagchambers@sabah.gov.my

Upon receiving your representations, the Chief Minister shall consider the same before deciding whether it is appropriate and in the publics' interest for him to exercise his powers pursuant to **Section 24A(1) of the Forest Enactment 1968**.

If, after the expiry of the said 30 day period, no representations are received from you, then you shall be deemed to have had the opportunity to be heard by the Chief Minister and thereafter, the Chief Minister shall proceed to decide or determine whether it is appropriate and in the publics' interest for him to exercise his powers pursuant to **Section 24A(1) of the Forest Enactment 1968**.

The Chief Minister looks forward to receiving your representations in terms of the above matters within 30 days of being served with this letter.

Thank you.

"BERKHIDMAT UNTUK NEGARA"

Yours faithfully,

DATUK FREDERICK KUGAN
Chief Conservator of Forests
For and on behalf of the Chief Minister of Sabah
and Minister in Charge of Natural Resources

[13] On 7 December 2021, the applicant sent a representation in response to the invitation letter ('the representations'). The full content of the representation can be found at encl 3, PDF pp 208 to 229.

[14] On 28 February 2022, having considered the representations as well as the High Court Winding Up Orders of LPSB and IUB and the letter from Messrs Norbert Yap & Associates dated 1 September 2021 (see: encl, PDF pp 426–427), the first respondent decided and deemed that:

(a) it is not in the publics' interest that the applicant — as the sole licencee of the SMFLA — is solely and ultimately owned by two insolvent and wound up companies, namely IPSB and IUB, respectively;

(b) further, distinctly and in addition, that it is not in the publics' interest that the applicant has since 2010, failed to obtain an approved Forest Management Plan and Annual Works Plan as required by the said SFMLA and the Enactment; and

(c) also, distinctly and in addition, that it is not in the publics' interest that the applicant has circumvented cl 120 of the SMFLA by effectively charging as collateral the said SFMLA — and its proceeds — in order to securitise LPSB's borrowings.

It is the respondent's contention that based on the above reasons — any one of which, solely or collectively — is sufficient for the first respondent to decide and determine this matter, the first respondent pursuant to his power under s 24A of the Enactment, deem it necessary in the public interest to cancel the SFMLA with immediate effect.

The content of the letter dated 28 February 2022 ('the cancellation letter') (see: encl 3, PDF pp 230–232) is reproduced here for convenience:

The Board of Directors
Idris Hydraulic (Malaysia) Berhad
(110930-U)
Unit A-9-09, Capital 1, Oasis Square
2, Jalan PJU 1A/7A
Oasis Damansara
47301 Petaling Jaya
Selangor Darul Ehsan

28th February 2022

Dear Sirs,

RE: IDRIS HYDRAULIC (MALAYSIA) BERHAD ('IHMB')

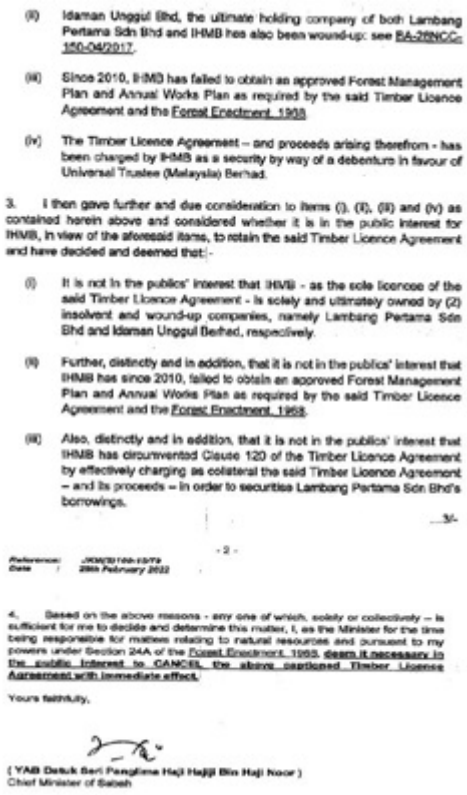
Cancellation of Sustainable Forest Management Licence Agreement (SFMLA: 01/97) dated the 10th of September 1997 pursuant to S24A Forest Enactment, 1968 (Sabah No.2 of 1968) –
(referred to as the said 'Timber Licence Agreement' or 'TLA')

1. I refer to the above Timber Licence Agreement, to the letter inviting you to be heard and make representations delivered to you on my behalf by the Chief Conservator of Forests dated the 9th of November 2021 and to your written representations dated the 7th of December 2021 (hereinafter referred to as 'IHMB's Representations').

2. I have given careful and due consideration to IHMB's Representations as well as to the High Court Winding-Up Orders in BA-28NCC-150-04/2017 and BA-28NCC-821-12/2019 and the letter from Messrs. Norbert Yapp & Associates dated the 1st of September 2021 and am satisfied from the contents of the same that: -

(i) Lambang Pertama Sdn Bhd, the sole shareholder of IHMB, has been wound-up: see BA-28NCC-821-12/2019.

...2/-



(ii) Idaman Unggul Bhd, the ultimate holding company of both Lambang Pertama Sdn Bhd and IHMB has also been wound-up: see BA-28NCC-150-04/2017.

(iii) Since 2010, IHMB has failed to obtain an approved Forest Management Plan and Annual Works Plan as required by the said Timber Licence Agreement and the Forest Enactment 1968.

(iv) The Timber Licence Agreement – and proceeds arising therefrom - has been charged by IHMB as a security by way of a debenture in favour of Universal Trustee (Malaysia) Berhad.

3. I then gave further and due consideration to items (i), (ii), (iii) and (iv) as contained herein above and considered whether it is in the public interest for IHMB, in view of the aforesaid items, to retain the said Timber Licence Agreement and have decided and deemed that:-

(i) It is not in the publics' interest that IHMB - as the sole licencee of the said Timber Licence Agreement - is solely and ultimately owned by (2) insolvent and wound-up companies, namely Lambang Pertama Sdn Bhd and Idaman Unggul Berhad, respectively.

(ii) Further, distinctly and in addition, that it is not in the publics' interest that IHMB has since 2010, failed to obtain an approved Forest Management Plan and Annual Works Plan as required by the said Timber Licence Agreement and the Forest Enactment 1968.

(iii) Also, distinctly and in addition, that it is not in the publics' interest that IHMB has circumvented Clause 120 of the Timber Licence Agreement by effectively charging as collateral the said Timber Licence Agreement – and its proceeds – in order to securitise Lambang Pertama Sdn Bhd's borrowings.

-2-

4. Based on the above reasons - any one of which, solely or collectively – is sufficient for me to decide and determine this matter, I, as the Minister for the time being responsible for matters relating to natural resources and pursuant to my powers under Section 24A of the Forest Enactment, 1968, deem it necessary in the public interest to CANCEL the above captioned Timber License Agreement with immediate effect.

Yours faithfully,

(YAB Datuk Seri Panglima Haji Hajiji Bin Haji Noor)
Chief Minister of Sabah

[15] On 30 March 2022, the applicant filed for judicial review.

[16] On 5 May 2022, leave for judicial review was granted by this court.

CONTENTION OF THE PARTIES

[17] The applicant has raised four grounds of challenge against the impugned decision which are relied upon alternatively as shown below:

First ground: Ultra vires and breach of natural justice

[18] The impugned decision is ultra vires s 24A of the Forest Enactment 1968 because the first respondent as the Minister for the time being responsible for matters relating to natural resources shall first give the applicant an opportunity to be heard as holder of the said timber licence agreement before exercising his powers to revoke or cancel the said timber licence agreement entered into under the Forest Enactment 1968. The said s 24A of the Forest Enactment 1968 is provided as follows:

A 24A Revocation or cancellation of licence

(1) Notwithstanding any provisions of this Enactment the Minister may, as and when he deems it necessary in the public interests, revoke or cancel a licence or licences or vary the conditions or impose such additional conditions upon such licence or licences entered into or issued under this Enactment.

B (2) For the purpose of this section 'licence' shall include a licence agreement entered into under section 15 of this Enactment: Provided that before exercising the powers conferred upon him under this subsection, an opportunity to be heard shall first be given by the Minister to the holder of the licence or the licence agreement.

C **[19]** However, the first respondent failed to give the applicant such an opportunity to be heard before exercising his powers to revoke or cancel the said timber licence agreement but he had instead authorised the Chief Conservator of Forests to issue a letter of invitation dated 9 November 2021 D ('letter of invitation') to the applicant of a purported opportunity to be heard by way of representations in writing over several alleged 'Public Interest matters' before he decides or determines whether to exercise his powers pursuant to s 24A(1) of the Forest Enactment 1968 and the said written representations are to be served not later than 30 days from date of service of E the said letter.

A true copy of the said letter of invitation is shown in exh WAF3A annexed to the applicant's second supplementary affidavit (encl 88) and also in exh DFK5 annexed to the first and second respondents' affidavit in opposition (encl 7).

F **[20]** It is submitted by the applicant that the said letter of invitation was issued by the Sabah Forestry Department (SFD) which has no jurisdiction to act on behalf of the first respondent who is the Minister for the time being responsible for matters relating to natural resources under the said s 24A of G Forest Enactment 1968 because only the first respondent being such Minister has the exclusive jurisdiction to act under the said s 24A.

[21] The said letter of invitation which is to give an opportunity to the applicant to be heard is a condition precedent under the said s 24A and H therefore it must be given under the letterhead of the office of the Chief Minister being the Minister for the time being responsible for all matters relating to natural resources under the Forest Enactment 1968.

I **[22]** However, the said letter of invitation was signed and issued by the Chief Conservator of Forests for and on behalf of the Chief Minister of Sabah and Minister in Charge of Natural Resources under the letterhead of the office of Jabatan Perhutanan Sabah (Sabah Forestry Department) which is therefore a

fundamental breach of s 24A since only the Chief Minister being the Minister in Charge of Natural Resources has the exclusive jurisdiction to act under the said s 24A.

[23] The applicant referred to the decisions in: (1) *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281; [2020] 1 CLJ 162; (2) *State Public Service Commission, Sarawak v Sarjit Singh Khaira* [1998] MLJU 591; [1999] 2 CLJ 809; (3) *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] 1 MLJ 169; and (4) *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi bin Mukhtar* [2020] 1 MLJ 141; [2020] 1 CLJ 1 to support its arguments.

Second ground: Procedural impropriety

[24] The applicants contend that the impugned decision is arrived at as a result of procedural impropriety because the alleged 'Public Interest matters' relied on by the first respondent to exercise his powers under the said s 24A of Forest Enactment 1968 are merely contractual matters related to alleged breach of cll 44, 51, 109(iii) and 120 of the said timber licence agreement, the breach of which could only invoke cl 110 for material breach and its attendant consequence of general penalty and power of the Sabah State Government/Chief Minister to suspend or terminate the said timber licence agreement under cl 111 thereof.

[25] The alleged 'Public interest matters' are in fact alleged breach of contract matters under the said timber licence agreement which falls under the jurisdiction of the Chief Conservator of Forests under s 24D of the Forest Enactment 1968 but not under the said s 24A.

[26] The applicant contends that the said letter of withdrawal, the applicant's said appeal under s 24D(7) of the Forest Enactment 1968 had therefore concluded in favour of the applicant and consequentially the said timber licence agreement has been reinstated to the applicant to its full terms and effect in law.

[27] Since the said timber licence agreement has already been reinstated following the applicant's appeal under s 24D(7) of the Forest Enactment 1968, the first respondent therefore could not exercise his powers under s 24A of the Forest Enactment 1968 to revoke or cancel the said timber licence agreement purportedly in the public interest without first giving the applicant an opportunity to be heard as mandated by the proviso in s 24A of the Forest Enactment 1968 which is under the exclusive jurisdiction of the first respondent as Minister in Charge of Natural Resources.

[28] The Federal Court in *Superintendent of Land and Survey Department Kuching-Divisional Office & Anor v Ratnawati bt Hasbi Mohamad Suleiman* [2020] 2 MLJ 553; [2020] 2 CLJ 425 held in a complaint of a breach of procedure in land acquisition proceedings which involved property rights that:

> [102] So, the question before the High Court was essentially whether a plain and formal breach of the statute was fatal to the hearing or not. The majority held that the statute was passed to ensure that specific safeguards would be complied with. Once a breach of the statute had been proved, what happened after or before would of no relevance and could not be used to cure such a breach. Thus, whether the common law requirements of procedural fairness were complied with or not were irrelevant once a breach of the formal procedure was established.

[29] The applicant submit that the first respondent has therefore committed serious procedural impropriety in arriving at the impugned decision.

Third ground: Irrationality and unreasonableness

[30] The applicant contends that the impugned decision is irrational and unreasonable because it was based on wrong appreciation of facts and failure to consider relevant facts.

[31] It is therefore submitted by the applicant that the first respondent had acted irrationally and unreasonably in arriving at the impugned decision as he had failed to consider matters which he is bound to consider and had failed to exclude matters that are irrelevant to what he must consider.

Fourth ground: Proportionality

[32] The impugned decision which is based on purported contravention or breach of public interest or public law is excessive as it violated the principle of proportionality.

[33] The Court of Appeal in *Ngiam Geok Mooi v Pacific World Destination East Sdn Bhd* [2016] 2 MLJ 741; [2016] 1 CLJ 395 held that:

> ... In essence, the proportionality principle requires the court to strike an effective balance between the severity of an employer's conduct and the sanction imposed. As Professor Endicott has eloquently remarked, it is 'unreasonable to use a sledgehammer to crack a nut, or to make a mountain out of a mole hill' (See Endicott, *Administrative Law*, p 273). This applies to awards of punishment also. Punishment should be commensurate with the gravity of the offence.

[34] It is submitted by the applicant that the impugned decision to cancel the said timber licence agreement is disproportionate and did not commensurate the alleged breach:

(a) the insolvency of the applicant's sole shareholder, Lambang Permata Sdn Bhd and its ultimate holding company, Idaman Unggul Bhd did not vitiate the capacity and/or competency of the applicant as a going-concern under the Companies Act 2016 (formerly Companies Act 1965), the severity of the cancellation of the said timber licence agreement is therefore out of all proportion to the applicant's status as a going-concern and separate legal entity from its shareholder and ultimate holding company, there being no evidential proof of misconduct in the affairs of the latter companies in their winding up as would be detrimental to commercial morality and public interest;

(b) the approval for the Forest Management Plan (FMP) and Annual Work Plan (AWP) under the said timber licence agreement and Forest Enactment 1968 is within the power and authority of the Sabah Forestry Department (SFD) in which the alleged failure by the applicant to obtain the FMP and AWP since 2010 is subject to resubmission and subsequent approval as provided by cl 51(ii) of the said timber licence agreement. The cancellation of the said timber licence agreement for such alleged failure is therefore grossly disproportionate and excessive when a resubmission and subsequent approval for the FMP and AWP could have been resorted to under the said cl 51(ii). Also, as the said timber licence agreement is a long-term 100 year contract, forbearance with non-achievement of short-term targets is anticipatory since the FMP has allowed for review after five years and updating every ten years as provided by cl 47(l) of the said timber licence agreement;

(c) the alleged charging by the applicant of the said timber licence agreement and the proceeds arising therefrom as security for the borrowing of Lambang Pertama in circumvention of cl 120 of the said timber licence agreement as alleged did not affect the rights or privileges of both the first respondent (for the Sabah State Government — the second respondent) and the applicant under the said timber licence agreement since the prior written sanction of the Chief Minister is a condition precedent thereto. The cancellation of the said timber licence agreement is therefore disproportionate and excessive since the first respondent's vis a vis the second respondent's rights or privileges thereunder remains intact as the said condition precedent under cl 120 could not be circumvented whatsoever. Also, based on the affidavit evidence as shown in the impugned debenture in exh DCMA13 annexed to the applicant's affidavit in support (encl 3), the said timber licence agreement and/or the proceeds therefrom was never charged

under the impugned debenture at all as it was not included and/or stated therein and not otherwise alleged; and

(d) further, in the event of default or material breach referred to in cl 110 of the timber licence agreement, the Government, that is, the second respondent may give the applicant as licensee a 30 days' notice to remedy or provide justification for its default and the Government (second respondent) shall have the right to fix in its absolute discretion such penalty not exceeding the amounts shown in cl 111(i)(a) to (g) of the timber licence agreement as shall be payable by the applicant as licensee.A copy of the timber licence agreement is shown in exh DCMA-1 annexed to the applicant's affidavit in support (encl 3).

[35] The High Court in *The Edge Communication Sdn Bhd v Ketua Setiausaha Kementerian Dalam Negeri & Anor* [2016] MLJU 1842; [2016] 1 LNS 1845 ruled that the suspension of the applicant's weekend newspaper by the Secretary General of the Ministry of Home Affairs in view of the controversial publication in its paper was disproportionate to the applicant's alleged breach of the Printing Presses and Publications Act 1984 at paras 69, 70 and 75 of the report, as follows:

> 69. I am of the view that the decision of the respondents to suspend the entire operation of the applicant was disproportionate and did not commensurate the alleged breach committed by the applicant, if any, (in this case I found there was no breach of the PPPA).

[36] The applicant contends that the impugned decision, based on the purported contravention or breach of public interest which is in the nature of a breach of contract under cll 44, 51, 109(iii) and 120 of the said timber licence agreement is excessive as it violated the principle of proportionality. The applicant submit that the first respondent's decision to cancel the said timber licence agreement is therefore grossly disproportionate and did not commensurate with the alleged breach of contract for which the first and second respondents' rights and remedies are already provided for and safeguarded under cll 110 and 111 of the said timber licence agreement.

[37] In summary, the respondents submit that the present proceeding concerns the first respondent's exercise of power and discretion under s 24A of the Forest Enactment 1968 ('the Enactment') to cancel in the public interest, a timber license agreement (the Sustainable Forest Management Licence Agreement or 'SFMLA') granted to the applicant. The applicant is a wholly owned subsidiary of a wound up holding company which has been under liquidation since 2020. Despite having the SFMLA for a period of 100-years from 1997, the applicant has not harvested any trees since 2007. Without any ongoing operations, the applicant is nothing but an asset of its holding company (in liquidation) where the applicant along, with its SFMLA, will be

sold off to the third parties in order to satisfy the debts incurred by the applicant's holding company. On this premise and against this background, inter alia, the first respondent deemed it to be in the public interest to cancel the applicant's SFMLA. Central to the present case is the overarching public policy interests of the Sabah State and Sabah's public control over its forest natural resources.

[38] The applicant contends that the first respondent's decision was illegal, procedurally improper, irrational and disproportionate. The first respondent submits otherwise. What is at stake is the future of Sabah's forest natural resources and the need for the same to be responsibly and sustainably managed for the benefit of the Sabah people. The respondents contend that the first respondent's decision to cancel the applicant's SFMLA was in accordance with the objectives and procedures set out in s 24A of the Forest Enactment 1968 (the 'Enactment'). The respondents submit that any reasonable Minister similarly placed would have decided that cancellation of the SFMLA was indeed in the public interest and wholly proportionate and proper. In reviewing the first respondent's decision, the court must exercise judicial restraint given that the present case falls within the category of executive decision making and public policy in respect of national/state interests — those being the sustainable management and exploitation of Sabah's forest natural resources.

EVALUATION AND FINDINGS

[39] In this application for judicial review, the applicant relied on four grounds to challenge the impugned decision which are set out in para 3 above.

[40] The applicants raised a preliminary point and contended that Datuk Frederick Kugan was not empowered by law to affirm the affidavits in opposition on behalf of the respondents because he was not delegated such powers under the Delegation of Powers Enactment 1963.

[41] The respondents submit that such contention is a non-starter. Affirming affidavits is not an exercise of power under the Forest Enactment 1968 or any other law. If affirming affidavits is not an exercise power, there is nothing to delegate under the Delegation of Powers Enactment 1963.

[42] The respondents contend that the only requirements for the affirmation of affidavits are found in O 41 of the Rules of Court 2012 ('the ROC'). Order 41 r 5 of the ROC provides:

5 Contents of affidavit (O 41 r 5)

A (1) Subject to Order 14, rules 2(2) and 4(2), to paragraph (2) of this rule and to any order made under Order 38, rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.

(2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information of belief with the sources and grounds hereof.

B

[43] In his affidavits, Datuk Frederick Kugan has expressly stated that:

1. I am the Chief Conservator of Forests. Pursuant to section 4 of the Forest C Enactment 1968 (Sabah No. 2 of 1968) ('Forest Enactment'), I am directly responsible for the administration of the forests of the State of Sabah and have general superintendence of all matters within the provisions of the Forest Enactment, and I am duly authorised to affirm this affidavit on behalf of the Respondents.

D 2. The facts deposed to herein are true to the best of my knowledge and belief and/or otherwise derived from the Respondent's records and/or documents and/or information to which I have access including from the records of the Sabah Forestry Department, save and except where I expressly state to the contrary or the context suggests otherwise. Where stated or applicable, I am advised by the Respondent's solicitors and believe their advice to be true.

E

[44] The affidavit evidence shows that Datuk Frederick Kugan has stated that he has knowledge of the issues raised in the present proceedings and that he has also derived from the respondents records which he has access to. Being F the Chief Conservator of Forests, which is the responsible body overseeing the Forest Enactment 1968, he was not a total stranger to the matters pertaining to the cancellation of the SFMLA. Further, the first respondent himself confirmed that Datuk Frederick Kugan was authorised to affirm the affidavit on behalf of the respondents. The first respondent himself has also confirmed G that Datuk Frederick Kugan's affidavits are accurate and true.

[45] It is also pertinent to point out that the applicant's objection against Datuk Frederick Kugan's affidavit was not premised on his lack of knowledge but solely by virtue of his position as the Chief Conservator of Forests. There is H nothing in law preventing the Datuk Frederick Kugan from affirming the affidavits which he has knowledge to. In the premises, the Court finds that the preliminary point or objection on Datuk Frederick Kugan's Affidavit is without merit.

I **[46]** The applicant submitted that cases of public interest or national interest are amenable to judicial review. The respondents have submitted at length in its written submissions that in cases concerning issues of public or national interest, the courts must exercise restraint in scrutinising the substance and substituting the decision with its own.

[47] The applicant is not only asking this court to hold that the considerations contained in the Letter of Cancellation were not matters of public interest, the applicant is also asking for a mandamus that the Sabah Forestry Department approves its Annual Work Plan and Forest Management Plan, 17 years after it was initially rejected by the Sabah Forestry Department.

[48] The respondents submit that insofar as what constitutes public or national interest, it is for the Minister to determine.

[49] In *Burmah Oil Co Ltd v Bank of England* [1980] AC 1090, the House of Lords held that:

> I entirely agree that the final decision as to whether or not the national interest made it necessary for Burmah to be saved from ruin was certainly a most important piece of policy making which probably required many delicate and secret factors to be considered. The terms upon which Burmah was to be obliged to sell its BP stock units to the bank, however, seem to me to have little to do with policy making in the ordinary sense of that term but only with the making of a hard and perhaps questionable business bargain.

[50] In *Minister for Immigration and Multicultural Affairs v Gunner* (1998) 84 FCR 400, the Australian Federal Court held:

> While the word 'excluded' signifies exclusion from merits review by the AAT, the effect is that, since the relevant decision under s 201 or s 501 has been made by the Minister acting personally, the Minister and no one else can make the decision as to what is in the national interest. Not only is the Minister directly answerable to Parliament for his or her decision, but Parliament must infact be informed of the decision: s 502(3).

[51] Similarly, in *Jia Le Geng v Minister for Immigration and Multicultural Affairs* (1999) 93 FCR 556, the Australian Federal Court held:

> Accepting then, that the Act in s 501 contemplates that the Minister may himself or herself revisit the issue of character of an applicant for or the holder of a visa, notwithstanding the existence of the AAT decision that the character requirements have been satisfied, the use of the power in s 502 to prevent a further review by the AAT of the issue is an entirely proper exercise of the power if the Minister is of the opinion that the circumstances specified are met. The section leaves to the Minister personally the decision as to what constitutes the seriousness of the circumstances giving rise to the making of the decision under s 501 and what is in the national interest. It is not possible to lay down with any degree of precision where the limits of the requirement will fall in any particular case. However, because the Minister is accountable to the Parliament for the decision, the matters in s 502(1)(b) are peculiarly for the assessment of the Minister.

[52] In Malaysia, the Federal Court in *Mohamad Ezam bin Mohd Noor v*

Ketua Polis Negara & other appeals [2002] 4 MLJ 449 held that:

> What matters of national interest are infinitely varied. So are matters of national security of the State. These are the concerns of the minister.

[53] In the present case, it is not up for this court to dictate what constitutes public interest within the meaning of s 24A of the Enactment as it involves difficult policy considerations that the first respondent is best equipped to deal with.

[54] Further, the applicant did not allege that the first respondent had acted mala fide in the cancellation of the SMFLA. Even in the case of *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals* [2002] 4 MLJ 449, relied by the applicant, the consideration by the Federal Court in quashing the detention order was premised on the finding of mala fide by the Minister.

[55] Given that the applicant is not questioning the bona fides of the first respondent but merely the merits of whether the considerations were public interest considerations and guided by the above authorities, this court must therefore refrain from embarking on a policy exercise on the proper exploitation of Sabah's natural resources.

Whether decision of the first respondent was ultra vires of s 24A of the Enactment

[56] The first ground of the applicant is that the first respondent has acted ultra vires by failing to give the applicant an opportunity to be heard before exercising is power under s 24A of the Enactment. The applicant argued that the invitation letter by the Chief Conservator of Forests was a breach of s 24A of the Enactment because it was not made on the letterhead and signed by the Chief Minister. The applicant contended that s 24A of the Enactment falls within the exclusive powers of the Chief Minister and could not be delegated to the Chief Conservator.

[57] The respondents submit that the applicant's submissions on this ground is misconceived. It is pertinent to point out that s 24A does not set out the manner by which the holder of the SFMLA is to be heard. It does not set out how such opportunity to be heard is to be given. There are no guidelines or procedure laid out.

[58] In the present case, the invitation letter was issued by the Chief Conservator of Forests on instructions of the first respondent. A distinction must be drawn between the first respondent exercising his power to revoke or cancel a license agreement and the first respondent instructing the Chief Conservator of Forests to issue a letter to the license holder, inviting the latter to be heard by the Chief Minister via written representations. The Chief

Conservator of Forests was neither exercising the powers of the first respondent nor had the first respondent delegated to the Chief Conservator of Forests, the power or duty to hear the applicant license holder.

[59] If there was a delegation of powers, then it would have been the Chief Conservator of Forests that would have heard and considered the representation of the applicant. But it was not, and the Chief Conservator did not. It is evident from the cancellation letter that the representations were indeed considered by the first respondent and not the Chief Conservator of Forests. An opportunity to be heard was for all intents and purposes afforded to the applicant by the first respondent. In this regard, the applicant's reliance on the Delegation of Powers Enactment 1963 is irrelevant. Moreover, the first respondent clearly acted within the limits of his powers under s 24A(1) and (2) by affording the applicant licence holder an opportunity to be heard via the said representations.

[60] Further, the Chief Conservator of Forests did not exercise the first respondent's power to cancel the SFMLA. It was the first respondent that had exercised his powers under s 24A(1) as seen in the cancellation letter. In this regard, the first respondent explained in his affidavit at encl 104 that:

> 4. I refer to Paragraphs 3 to 6 of Enclosure 103 where the Applicant alleged that I could not authorise Datuk Frederick Kugan to affirm affidavits as I was not empowered by law to do so and Datuk Frederick Kugan has purportedly no personal knowledge of the facts deposed therein. Firstly, I am advised by the Respondents' solicitors and verily believe that there is no provision in law preventing me from authorising Datuk Frederick Kugan from affirming affidavits on behalf of myself and the second Respondent. It is common in government that its officers undertake tasks on behalf of the government. It is immaterial whether Datuk Frederick Kugan was appointed by the State Public Service Commission given that they are all part of the executive branch of the Sabah State which the Chief Minister is effectively heading. Second, I confirm the averments made by Datuk Frederick Kugan in Enclosures 7, 14, 29, 30, and 102 as true and accurate.

[61] The applicant's reliance on the cases of *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281; [2020] 1 CLJ 162 and *State Public Service Commission, Sarawak v Sarjit Singh Khaira* [1998] MLJU 591; [1999] 2 CLJ 809 is also irrelevant given that those cases concern the exercise of power vested in one person by another person. The powers under s 24A of the Enactment to hear and to decide was in fact exercised by the first respondent. Therefore, the court finds that there was no procedural impropriety by the first respondent and there was also no issue of the first respondent acting ultra vires of s 24A of the Enactment.

Whether the first respondent's decision was procedurally proper

[62] The second ground of the applicant is that the matters in the invitation letter are essentially contractual matters that fall within the jurisdiction of the Chief Conservator of Forests under s 24D of the Enactment. The applicant contends that the first respondent had acted ultra vires of s 24A of the Enactment by using the powers therein on what is essentially a contractual issue.

[63] The respondents submit that s 24A contains a non-obstante clause where it starts with 'Notwithstanding any provisions of this Enactment'. A non-obstante clause has the effect of overriding all other legal provisions. In the case of s 24A, it overrides all other provisions of the Enactment. The Federal Court in *Perbadanan Kemajuan Kraftangan Malaysia v DW Margaret a/p David Wilson (t/a Kreatif Kraf)* [2010] 2 MLJ 713 explained that 'The term 'notwithstanding' means generally 'not to stand against it', or 'in the way' or overriding'.

[64] The approach to be taken in interpreting a non-obstante clause was also considered by the Federal Court in *Ho Tack Sien & Ors v Rotta Research Laboratorium SpA & Anor (Registrar of Trade Marks, intervener)* [2015] 4 MLJ 166:

> [39] Although s 40(1) of the Act begins with the words 'notwithstanding ...'. it is a general principle that a non-obstante clause cannot go outside the limits of the Act itself. We are in agreement with the contention of the plaintiff that non-obstante clause is subject to the limitations contained in the section and cannot be read as excluding the whole Act and standing by itself ...

[65] In the present case, the primacy of s 24A is clearly demonstrated by the non-obstante clause and the breadth and scope of the provision. Section 24A empowers the first respondent to not just revoke or cancel a license, it also empowers the first respondent to vary the conditions or impose such additional conditions. The only limitation to s 24A is that the first respondent must: (i) deem it to be in the public interest; and (ii) afford the licensee an opportunity to be heard before exercising his powers. Section 24D concerns the termination (not cancellation) of the license, and is narrower in its scope to that of s 24A of the Enactment. Given the wording of s 24A, it is clear that the Sabah Legislature did not intend for s 24A to be limited by s 24D of the Enactment.

[66] In the present case, the applicant contends that the withdrawal of the letter of termination by the Chief Conservator dated 9 July 2021 amounts to a reinstatement of the SFMLA and therefore the first respondent could not exercise his powers under s 24A of the Enactment without first giving the applicant an opportunity to be heard (see: para 52, encl 89). The respondents submit that this contention is baseless for the reasons above and because the withdrawal of termination letter was made 'without prejudice'. In any event,

the cancellation was wholly pursuant to s 24A and the applicant was afforded an opportunity to be heard by the first respondent via the invitation letter. The applicant was then properly heard via its submission of the said representations to the first respondent.

[67] From the facts and affidavit evidence, the court finds that there was no procedural impropriety by the first respondent in undertaking a procedure under s 24A of the Enactment.

Whether the first respondent's decision was rational

[68] The third ground of the applicant is that the first respondent's decision was irrational because, in a nutshell:

(a) the first respondent failed to consider that applicant is a solvent company and is a separate legal entity from its insolvent holding company, LPSB, and its insolvent ultimate holding company, IUB;

(b) the first respondent failed to appreciate and/or scrutinise properly the debenture which, the applicant argues, do not include the SFMLA, which is denied by the first respondent; and

(c) the first respondent did not appreciate and/or consider the applicant's explanation in its letter to the Sabah Forest Department dated 1 September 2006. The first respondent was also wrong to rely on the ground that the applicant had failed to obtain an approved Forest Management Plan and Annual Work Plan since 2010 because this ground was relied on by the Chief Conservator of Forests in his letter of termination dated 9 July 2021, which has now been rendered otiose since it has been disposed of by the first respondent in the applicant's appeal under s 24D(7) of the Enactment.

[69] The respondents submits that this court must exercise caution and restraint in reviewing the substance of the first respondent's decision. As submitted above, in cases involving matters of national and state interest, the courts must give due deference to the decision maker. In essence, control over the State's natural resources is a matter that usually falls within the realm of exclusive executive decision making because the executive is better positioned than the courts to determine such policy questions and render decisions.

Wound up holding company and ultimate holding company

[70] Firstly, in relation to the insolvency of the applicant's holding company, LPSB, and ultimate holding company, IUB, the first respondent has decided that it is not in the public interest for a licensee to be under effective control of insolvent owners.

[71] It cannot be denied the applicant, as a wholly owned subsidiary, is an asset of LPSB and is therefore part of the liquidation process. The liquidation of LPSB will inevitably involve the sale of the applicant in order to settle the debts of LPSB's creditors. In fact, as admitted by the applicant, this was indeed the goal. The applicant's own letter dated 7 November 2021 to LPSB states:

> 2. Our objective is to act in the best interest of the Company in relation to the disposal exercise of Idris 100% shares together with rights under the SFMLA. We wish to insist that our views and approval must be included in determining the correct price to sell the rights under the concession license. We strongly believe that we have the right experience and the 'know-how' to determine and negotiating on the price for the sale.
>
> 3. We insist that the sale price must reflect the correct commercial value of RM1.2 billion as mentioned in the valuation report that we conducted in 2014 and shall not be undercut only to settle the amount owing the RSLS Holders alone. We are of the view that the rights of the existing shareholders must also be included in the settlement and must be taken care of using the additional proceeds of sale after deduction of the amount owing to the Creditors.
>
> 4. The Valuation Report was prepared by HASB Consultants Sdn Bhd, a Chartered Valuation Surveyor with the right experience to value timber concession and we are of the opinion that the valuation represents the correct commercial value of the concession. We are also of the opinion that selling Idris under value would be the wrong approach and an injustice to the shareholders.
>
> 5. Furthermore, no trees have been cut since 2007 and due to this the value of the trees would have increased since.

[72] Evidently, the applicant's plan all along and in this judicial review was not to comply with the SFMLA but to ensure that it can be sold to the highest bidder and together with it, the right over Sabah's forest natural resources in FMUs 8 and 13.

[73] It cannot be denied that, as a result of the liquidation of LPSB and IUB, the right over Sabah's forest natural resources would be up for sale to the highest bidder. This takes away the State Government's prerogative over who will be in effective control over Sabah's forest natural resources. When SFMLAs are granted, due consideration is given to not just the entity but the individuals behind and in control of such entities. It is common for any responsible regulatory body to examine and conduct diligence on the shareholders and owners of the licensee. Here, those behind the licensee are insolvent. Twice over.

(a) insolvency is evidence of poor financial management. It is therefore plain and obvious that it is in the public interest that the State's forest natural resources are competently and sustainably managed by responsible and capable persons — not liquidators, receivers and managers or strangers to the state; and

(b) insolvency also means that those who were originally granted the license are no longer in charge or likely to be replaced as the liquidator or new owners will want to replace the existing directors or officers and put in place their own, which could be a foreign entities or person undesirable to the State.

[74] Even though the sale of the applicant — as a subsidiary of LPSB — to the highest bidder may not be prohibited under the SFMLA, the first respondent is nevertheless empowered under s 24A of the Enactment to consider whether such sale is in the public interest since it is a matter that goes above and beyond the scope of the SFMLA. In such circumstances, it was reasonable for the Minister to have done so and to conclude that it isn't in the public interest for the applicant — and by extension the SFMLA — to be sold off to the highest bidder. The State, in such circumstances, would have been put in a position where it would have to deal with a stranger or worse, a person or entity that is unqualified, unsuitable or one that would not have otherwise been granted an SFMLA in the first place.

[75] Further, it is evident from the financial statements of the applicant that it is completely reliant on financial contribution from its holding company and ultimate holding company, who contributed more than 95% of the applicant's total share capital. By itself, the applicant only has assets of RM10,000 which is insufficient to cover its liabilities (see: encl 7, PDF p 901 onwards). With the winding up of LPSB and IUB, there is no more financial support to the applicant. Therefore, the applicant's portrayal that it is unaffected the winding up of LPSB and IUB is inaccurate.

[76] In the premises, the applicant's argument that it is a separate legal entity is insufficient to assuage the real concerns behind the insolvency of its holding company and ultimate holding company.

Debenture creating a charge over the SFMLA

[77] Secondly, in relation to the debenture, the applicant's contention that the SMFLA is not included in the debenture, it is apparent from the debenture that the SFMLA has been charged in favour of Universal Trustee (M) Bhd since 23 October 2003. Clauses 6.1.3 and 6.1.4 states (see: encl 3, PDF pp 407):

6. Charging Clause

6.1 Charge

By way of continuing security in favour of the Trustee for the payment to the Trustee of all principal outstanding and all moneys and liabilities due and payable in respect of Loan Stocks (A), the Chargor as beneficial owner hereby charges:

6.1.3 by way of a first floating charge all the undertaking and other properties and assets of the Chargor (other than those referred to in clauses 6.1.1 and 6.1.2) movable and immovable whatsoever and wheresoever situate both present and future including, without limitation, the Chargor's stock-in-trade (including stocks of raw materials and finished products) and all book debts both present and future;

6.1.4 by way of a first floating charge, all of the Chargor's undertaking and other properties (other than those specified in clauses 6.1.1, 6.1.2 and 6.1.3 of this Debenture) movable and immovable whatsoever and wheresoever situate both present and future including the Chargor's goodwill and uncalled capital.

[78] If cl 6.1.3 and 6.1.4 are not clear, cl 10 states (see: encl 3, PDF pp 408):

> **10. Further Assurance -Execution of Further Charges**
>
> The Chargor shall at any time if and when required by the Trustee immediately at its own expense execute or cause to be executed in favour of the Trustee and deliver to the Trustee such further legal or other mortgages, charges, assignments or securities as the Trustee may require of and on all the properties and assets charged under this Debenture or such part of such properties and assets as the Trustee may specify, in such form as the Trustee may require, to perfect the security granted under this Debenture and exercise all powers, authorities and discretions vested in the Trustee or in any delegate or sub-delegate and pending the execution and delivery of any such mortgages, charges, assignments, or security the Chargor shall each hold such properties and assets upon trust for the Trustee subject to the provisions of this Debenture.

[79] The letter from Norbert Yapp & Associates dated 1 September 2021 confirms that SFMLA had indeed been charged under the debenture, as security for the debt obligations of LPSB in respect of payments to a category of loan stocks payable to Universal Trustee (M) Bhd and to Ambank (M) Bhd (see: encl 3, PDF pp 426):

> **We act for Universal Trustee (Malaysia) Berhad of 3rd Floor, No. 1, Jalan Ampang, 50450 Kuala Lumpur. Our clients are the trustee for AmBank (M) Berhad.**
>
> **Idris Hydraulic (Malaysia) Berhad ("Idris Hydraulic") has executed a Debenture in favour of our clients on 23 October 2003. By the said Debenture, Idris Hydraulic agreed to charge all its assets and properties by way of fixed and floating charges in favour of the Trustee, as security for the debt obligations of Lambang Pertama Sdn Bhd. ("Lambang Pertama"), in respect of payments due under a category of loan stocks (RSLS-A) payable to our clients and to AmBank (M) Berhad ("AmBank"). The Sustainable Forest Management Licence Agreement dated 10.09.1997 (SFMLA), including proceeds arising therefrom form part of the assets of Idris Hydraulic covered by the Debenture.**

[80] The applicant's explanation in the representation that it has no such indebtedness and unenforceable against it was not acceptable to the first respondent. The reason why the applicant has no such indebtedness is because it is nothing but an asset of the now wound up holding company, LPSB. If LPSB is indebted, the applicant and its assets and properties are liable to be liquidated as part of LPSB's assets. There is also no basis to say that the debenture is unenforceable against the applicant given the clear words of cll 6.1.3, 6.1.4, and 10 of the debenture.

1. For completeness, the objective of the SFMLA, inter alia, is for revenues and proceeds from the extraction and felling of trees to be reinvested into reforestation and tree planting within the SFMLA area. Revenues are not there to finance or cover the business debts of the applicant's holding (LPSB) and ultimate holding companies (IUB).

Failure to obtain an approved Forest Management Plan and Annual Works Plan since 2010

[81] The applicant's explanation on this issue in its representations was to place blame upon the Sabah Forest Department for what is essentially the applicant's own failures. The onus to obtain an approved Forest Management Plan and Annual Works Plan lies with the applicant under the SFMLA and the Enactment. If the applicant truly has been aggrieved by the Sabah Forest Department, then it should have commenced legal action against the Sabah Forest Department at the material time and in a timely fashion. This was not done till to date. This belated attempt by the applicant to pin the blame on the Sabah Forest Department appears to be an afterthought.

[82] As for the applicant's argument that this issue has now been rendered otiose since it has been disposed of by the first respondent in the applicant's appeal under s 24D(7) of the Enactment, the respondents submit that the withdrawal of the letter of termination dated 9 July 2021 by the Chief Conservator of Forests does not prevent the first respondent from taking into account the same ground. The withdrawal of the letter of termination dated 9 July 2021 by the Chief Conservator of Forests was made without prejudice and does not in any way bind the first respondent and his exercise of power under s 24A.

[83] It is imperative to note that the applicant has not harvested the forests since 2007. This can be seen from the applicant's letter to LPSB dated 3 November 2021:

5. Furthermore, no trees have been cut since 2007 and due to this the value of the trees would have increased since.

.../2

[84] The failure of the applicant to harvest any trees since 2007 means that the second respondent has also been deprived of royalties since 2007. Monies collected for this purpose could have been used for development and the wellbeing of the people of Sabah. The applicant has not shown any plans to revive operations to implement the SFMLA in the representation. Further, it is unclear how long more the dispute between IHMB and the liquidators will continue and how long the entire liquidation process will take. The State of Sabah and, by extension, the Sabah public cannot and should not suffer for the incompetency, impecuniosity and virtual insolvency of the applicant licensee.

[85] Under the head of irrationality, the applicant must show that the decision was so outrageous in its: (i) defiance of logic or of accepted moral

standards that (ii) no sensible person who had applied his mind to the question to be decided could have arrived at it. From the affidavit evidence, it is evident that the applicant has failed to show this. To the contrary, the respondents have shown that the decision of the Chief Minister to cancel the applicant's license was rational under the circumstances.

Whether the first respondent's decision was proportionate

[86] The fourth ground for the applicant is that the cancellation of the SFMLA was not proportionate for reasons similar to the third ground. The applicant argued that the breaches to the SFMLA could be remedied by the applicant without the need for cancellation of the SFMLA.

[87] The respondents make two points on this fourth ground. First, this court must be cautious and refrain from substituting its own decision with that of the first respondent since the nature of this case involves matters of pure public policy and national/state interests. Proportionality would inevitably involve weighing the interest of the applicant and the interest of the Sabah public and these matters of pure policy to which the first respondent is more equipped to determine.

[88] Second, this court could not entertain any contention by the applicant that it is able to remedy any breaches to the SFMLA or that it can 'turn the corner' because the applicant has not shown any plans to revive operations to implement the SFMLA in the said written representations. The respondents reiterate that this judicial review must be confined to and only consider, matters that were before the decision maker at the material time the decision was being made. Extraneous evidence, documents, assertions or otherwise raised only as part of these proceedings and well after the fact, are irrelevant to the Minister's decision-making process at the time and, more broadly, to these judicial review proceedings.

[89] Even with the said representations and the many voluminous affidavits filed, the applicant has not shown in any way whatsoever how it intends to deal with the winding up of IPSB and IUB, resolve the debenture, and 'revive' the SFMLA and carry out its obligations therein. All that can be discerned from the affidavits and the communication between the applicant and the liquidator is that the sole plan is to sell the applicant and the SFMLA to pay off the creditors.

[90] The applicant contends that the public interest matters were essentially breach of contract matters and the first respondent should have varied the conditions or impose additional conditions under the SFMLA instead of cancelling the SFMLA. The respondents contend that the applicant is grossly downplaying the entire issue. The applicant is an asset of two wound up

holding and ultimate holding companies. The creditors to the two wound up holding and ultimate holding companies as well as the applicant is looking at selling the SFMLA to unknown third parties. This is evidenced by the correspondence between the applicant (see: encl 7, pp 859) and the liquidator as well as the valuation reports prepared for this purpose.

[91] Further, the applicant has not provided any plans or evidence of trying to 'turn the corner' in its representation or in any of its affidavits. It is apparent that the applicant's only plan is to prevent the SFMLA from being cancelled so that it can sell the same to the highest bidder. Under these circumstances, there is no question about varying the conditions or imposing additional conditions under the SFMLA given that there is simply no prospect of revival. The Sabah people should not be embroiled in the liquidation process and be deprived of the revenue which they would otherwise gain from the responsible exploitation of Sabah's natural resources.

[92] The first respondent has explained his reasons behind the decision and why he deemed it necessary in the public interest to cancel the said SFMLA. In contrast, the applicant has failed to provide any good reasons as to why it would not be in the public interest to cancel the SFMLA. There is a presumption that executive acts are done in good faith and for the public benefit. The Supreme Court in *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185 at p 191; [1987] 1 CLJ 451 p 459, para 32 held that:

> There is a presumption that the administration exercises its powers in good faith and for public benefit. The applicant has failed to rebut this presumption by proving bad faith on the part of the first respondent and proving that the first respondent has not acted in the public benefit.

[93] Even if there is an error of law, it is settled law that the remedies of certiorari or declaration would not be granted to set right mere errors of law unless substantial injustice has ensued. In *Superintendent of Land and Survey Department Kuching-Divisional Office & Anor v Ratnawati bt Hasbi Mohamad Suleiman* [2020] 2 MLJ 553; [2020] 2 CLJ 425, the Federal Court held:

> It is also settled in our law that the courts should not allow themselves to be turned into courts of appeal or revision to set right mere errors of law which do not occasion substantial injustice. The law as explained in *Ngu Toh Tung & Ors v Superintendent of Lands & Surveys, Kuching Division, Kuching & Anor* [2006] 1 MLJ 142 at pp 147 to 148 ...

[94] From the affidavit evidence and the surrounding circumstances of this case, the court finds that the cancellation of the SFMLA was proportionate. The court does not find that substantial injustice has occurred from the said cancellation.

Oral hearing

[95] The applicant has raised a new point which was not pleaded in its statement under O 53 r 3(2) ROC, that the applicant was not afforded an oral hearing. It is trite that parties are bound by their pleadings, even in judicial review proceedings. In *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304, the Federal Court held:

> There appears therefore to have been a complete disregard of the procedure prescribed and to be followed by the solicitors for the hospital. No point was however taken by counsel for Dr Dutt at any stage of the proceedings. We have however mentioned them not merely to draw attention to the fact that the new rules, the Rules of the High Court 1980 continue largely the same practice, O 53 rule 1(2) requiring such a statement, r 1A limiting the time for such an application, now, to six weeks of the order sought to be quashed and r 3(1) providing that subject to the discretion of the court, no grounds shall be relied upon and no reliefs sought except those set out in the statement. We have done so also because the same solicitors had previously filed such a statement in its application for prohibition and because as will be seen, this amorphous application enabled the hospital to roam at large, well outside its proper confines.

See also: *Muhamad Nizam bin Man v Tribunal Tuntutan Pengguna Malaysia & Anor* [2023] MLJU 158 (HC).

[96] In any event, s 24A of the Enactment does not set out the procedure by which an opportunity to be heard is afforded. The applicant has not objected to the procedure adopted by the first respondent by inviting the applicant to provide representation. The applicant certainly has not requested for an oral hearing to be held. The very first time the issue of an oral hearing has been raised is in the applicant's written submission in reply. This appears to be an afterthought.

[97] In *Andrew Heng v Suruhanjaya Sekuriti Malaysia* [2021] MLJU 864, the High Court judge held:

> [32] There has been no breach of the rules of natural justice by the respondent as the requirement under s 31Z(5) of the Act for an opportunity to be heard does not equate to an oral hearing as of right and there is no right to an oral hearing.
>
> The rules of natural justice had been met with the applicant being given an opportunity to be heard by the AOB byway of written representations.

[98] The case of *M Sentivelu a/l R Marimuthu v Public Services Commission Malaysia & Anor* [2005] 5 MLJ 393 is not applicable to the present case given that the disciplinary hearing is governed by General Orders Cap 'D' while s 24A of the Enactment does not set out any procedure whatsoever. Further, *M Sentivelu* was distinguished by subsequent Court of Appeal decisions. In *Yusof bin Sudin v Suruhanjaya Perkhidmatan Polis & Anor* [2008] 4 MLJ 687, the

Court of Appeal found:

> [14] It is quite unfortunate that subsequent cases considered by courts subordinate to the Federal Court barely touched this case. Regretfully too, the Court of Appeal authorities cited to us in particular Mat Ghaffar bin *Baba v Ketua Polis Negeri & Anor* [2008] 2 MLJ 1, *Ang Seng Wan v Suruhanjaya Polis Di Raja Malaysia* [2002] 2 MLJ 131 and *M Sentivelu a/l R Marimuthu v Public Service Commission Malaysia & Anor* [2005] 5 MLJ 393 are distinguishable and inapplicable, in light of the above Federal Court decision in *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* [2001] 2 MLJ 417.
>
> [15] In the light of the above Federal Court case, it is succinctly clear that an oral hearing is not an absolute right, which must be granted to the appellant ... This refusal to allow the appellant an oral hearing is therefore was not contrary to the law.
>
> [16] What was important at the end of the day was the requirement that the appellant be given reasonable opportunity of being heard (*B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] 1 MLJ 169).

[99] In the present case, the first respondent has afforded the applicant an opportunity to be heard. Apart from questioning the validity of the invitation letter, the applicant did not complain that it has been deprived of an opportunity to be heard orally until its written submission in reply. as such, the court finds that there is no merits in the applicant's contention on this issue.

Whether applicant has provided 'overw helming evidence' that the M inister's substantive decision was unreasonable or irrational

[100] To successfully challenge the substance of a Minister's decision on the grounds of 'unreasonableness' or 'irrationality' the applicant must put before the court 'overwhelming evidence' that no reasonable decision maker in the same position as the Minister could, given the same facts and circumstances, have arrived at the same decision.

[101] The 'overwhelming evidence' standard was first laid down in Lord Greene MR's speech in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 where His Lordship observed that:

> ... if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the Courts can interfere...but to prove a case of that kind would require something overwhelming, and, in this case, the facts do not come anywhere near anything of that kind.

[102] The Federal Court in *Malaysia Airline System Bhd v Wan Sa' adi @ Syed Sa' adi bin Wan Mustafa* [2015] 1 MLJ 757; [2015] 1 CLJ 295 upheld an Industrial Court decision on the basis that there was an absence of 'overwhelming evidence' to support the applicant's claim that the decision in question was manifestly unreasonable.

A [38] Indeed a decision would also be considered manifestly unreasonable if no body of persons could have reached it. But in order to come to such conclusion there must be overwhelming evidence to support it.

[39] Accordingly, in this case on the facts and circumstances as found by the Industrial Court based on the evidence adduced, we find no reason to conclude that
B the Award of the Industrial Court was manifestly unreasonable or that the Industrial Court had committed an error of law in the 'Wednesbury unreasonableness' sense.

C **[103]** In this proceeding, there is clear absence of any 'overwhelming evidence' to support the applicant's claim that the first respondent's decision to cancel the said Sustainable Forest Management License Agreement ('SFMLA') was unreasonable or irrational.

D **[104]** Merely calling the first respondent's decision 'perverse' or 'perverted' is insufficient. What the applicant must do — and has failed to do — is to put before this court, 'overwhelming evidence' that no reasonable Minister could or would have, cancelled the applicant's SFMLA given the same circumstances and facts.

E **[105]** Mere disagreement with the Minister is insufficient and this includes situations where there are two competing outcomes and the Minister chooses one outcome over the other: see *Malaysian Oxygen Bhd v Soh Tong Wah and another appeal* [2015] 3 MLJ 730; [2015] 1 CLJ 191 (CA). An example of this would be the Minister's decision to develop an airport in Kimanis as opposed
F to Tuaran. Or to allocate more resources to water supply than to electricity infrastructure.

[106] In this judicial review, there is no evidence to suggest that the applicant was not given a reasonable opportunity to be heard. To the contrary, it is
G appears that the applicant did not make full use of the opportunity to be heard by submitting for the first respondent Chief Minister's consideration, all relevant materials that could have persuaded the latter to have acted differently. Instead, the applicant only submitted two letters and a brief set of arguments and allegation which, neither answered nor were persuasive in terms of why the
H Minister should not exercise his powers to cancel the said SFMLA in the public interest.

[107] This court observed that there are vastly more documents supplied by the applicant before this court than were put before the first respondent Chief
I Minister at the material time. In short, the applicant simply did not take seriously its opportunity to be heard.

[108] It is also undisputed that the applicant has failed to harvest any tree in the timber concession area which was mainly due to serious internal or

financial issues faced by its shareholder and ultimate holding company and thereby depriving the state of Sabah of substantial revenue from its own natural resources.

Principle of judicial review

[109] It is settled that a judicial review is not an appeal and an impugned decision is susceptible to judicial review on the grounds of 'illegality', 'irrationality', 'procedural impropriety' and 'proportionality'. In *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, the Federal Court (per Edgar Joseph Jr FCJ) held:

> It is often said that Judicial Review is concerned not with the decision but the decision making process (see eg *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155). This proposition, at full face value, may well convey the impression that the jurisdiction of the courts in judicial review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of Lord Diplock in Council of *Civil Service Unions & Ors v Minister for the Civil Service* [1985] AC 374, where the impugned decision is flawed on the ground of procedural impropriety.
>
> But Lord Diplock's other grounds for impugning a decision susceptible to judicial review make it abundantly clear that such a decision is also open to challenge on grounds of 'illegality' and 'irrationality' and, in practice, this permits the courts to scrutinise such decisions not only for process, but also for substance.

[110] In *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629, the Federal Court held:

> '(1) Where the facts do not support the conclusion arrived at by the Industrial Court, or where the findings of the Industrial Court had been arrived at by taking into consideration irrelevant matters, and had failed to consider relevant matters into consideration, such findings are always amenable to judicial review.
>
> [15]... Historically, judicial review was only concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety. However, over the years, our courts have made inroad into this field of administrative law. *Rama Chandran* is the mother of all those cases. The Federal Court in a landmark decision has held that the decision of inferior tribunal may be reviewed on the grounds of 'illegality', 'irrationality' and possibly 'proportionality' which permits the courts to scrutinise the decision not only for process but also for substance. It allowed the courts to go into the merit of the matter. Thus, the distinction between review and appeal no longer holds.

CONCLUSION

[111] After perusing the application for judicial review, statutory statement, affidavits and the submissions filed by both parties, this court finds that the applicant had failed to prove that the impugned cancellation of the said

SFMLA in the public interest is invalid on grounds of illegality, irrationality, procedural impropriety or proportionality as enunciated by the Federal Court in *Rama Chandran* and *Ranjit Kaur* above. Neither does the court find that the respondents had taken into consideration irrelevant matters or had failed to consider relevant matters in the issuance of the said notices. In the premises, the said letter of cancellation which is issued in accordance with the law is valid.

[112] Based on the aforesaid reasons, the substantive application for judicial review is dismissed with costs in the total sum of RM40,000 to be paid by the applicant to the respondents subject to allocatur fee.

Application dismissed.

Reported by K Selvaraju